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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 693

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondents' argument is predicated upon erroneous premises relating to: (1) the nature of the bond and liability thereon; (2) the necessity for an entry of "forfeiture" upon the bond; and (3) the dependence of the bond upon the validity and continued existence of Section 26 of the National Prohibition Act.

I

In order to bring the situation within the principle of the decision of this Court in the *Chambers*

case, respondents make several arguments as to the nature of the bond and liability thereon.

(1) *Alleged identity of bond and boat.*—Respondents first contend that the "vessel or its equivalent, the bond" are one and the same (Br. p. 3), and that therefore, since one could not proceed to secure a forfeiture against the property after the repeal of the Eighteenth Amendment, there can be no further procedure against the bond.

The idea that the bond takes the place of the boat is borrowed from admiralty law. But admiralty bonds are not similar in character and perform an entirely different function. The ordinary bond or "stipulation" in admiralty stands "merely * * * in place of the vessel itself."[1] But this results from the express condition of admiralty bonds. The bond herein is conditioned upon the return of the boat "on the day of the criminal trial" whereas the typical admiralty bond is conditioned that "the stipulators * * * pay the amount awarded by the final decree."[2] Under

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[1] *The City of Norwich*, 118 U. S. 468, 489. See also *In re Morrison*, 147 U. S. 14, 34–35; *United States* v. *Ames*, 99 U. S. 35, 36; 1 Benedict, Admiralty, 5th Ed., 436, 450–451; Hughes, Admiralty, 2d Ed., 407, 497.

[2] 2 Benedict, Admiralty, 5th Ed., 307–308, and see also pp. 311–312, 315–316, 320–321. There are, of course, certain bonds in admiralty on the arrest of a person similar to the bond herein. *Id.*, pp. 325–326, 328–329. And there are also bonds for the actual return of the vessel. *Id.*, pp. 335, 336–337. In the ordinary admiralty bond, given as a substitute for the vessel, judgment is given against the stipulators. *Id.*, pp. 537–538.

the latter type of bond, the vessel cannot be reseized or rearrested in the same suit.[1]

The bond herein was given, not to take the place of the defendants arrested or the boat seized but to make the United States whole "against loss from letting the [vessel] out on bond" in case it was not returned to the jurisdiction of the court on the day of the criminal trial. *United States* v. *Warnell*, 67 F. (2d) 831, 832 (C. C. A. 5th). Upon breach of the condition of the bond, a right upon contract against the respondents was substituted for criminal proceedings under the National Prohibition Act.

(2) *Nature of liability on bond.*—Secondly, respondents contend that there is "but a claim of liability under the bond just as a claim of liability against a personal offender charged with violation of the National Prohibition Act" (Br. p. 4); that "the amount recoverable" under the bond "is a sum assessed for violating the Prohibition Law" and "involves the idea of punishment for infraction of the law" (Br. pp. 11–12); that the bond was given merely to insure that if a "penalty would ever arise" it then "should be discharged" (Br. p. 13); and that "if the action on this bond * * * survives the repeal then it must be held that the action against the vessel for which the bond had been given would survive the repeal" (Br. p. 6).

Throughout the brief, liability on the bond is characterized as a "penalty." But this merely ig-

[1] 1 Benedict, Admiralty, 5th Ed., 436.

nores the fact that the bond is a contract, and the liability thereon after breach of condition is only that provided by the terms of the contract.

Congress, in Section 26, granted claimants of seized property the valuable right to the return of property in exchange for a guaranty against loss from failure to return the property to the jurisdiction of the court on the day provided. Principal and surety have voluntarily applied for, and secured, a release of the vessel; the condition of this release, as provided in Section 26 of the National Prohibition Act, is that the vessel be returned "on the day of the criminal trial" or the parties be liable in contract "to make the United States whole against loss." *United States* v. *Warnell*, 67 F. (2d) 831, 832 (C. C. A. 5th). See *United States* v. *Biegert*, 8 F. Supp. 884 (D. N. J.). The parties having failed in their undertaking, the liability on their contract has become fixed—and proceedings to enforce that liability are in no way attempts to assess a penalty or impose a punishment.

Respondents are principal and surety only and, as such, obviously could not be the subject of a penalty or punishment under the Prohibition Act; for it is axiomatic that principal and surety can be held only according to the terms of contract, no more and no less.[4] Enforcement of the criminal

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[4] See *Lamphire* v. *State*, 73 N. H. 463, 464; *State* v. *Kinne*, 39 N. H. 129, 135; *Commonwealth* v. *M'Neill*, 36 Mass. 127, 138; *State* v. *Chandler*, 79 Me. 172, 175; *State* v. *Posey*, 79 Ala. 45, 46. The same rule was followed in Texas in

law occasioned the contract here (Br. p. 6), but that fact does not change the nature of the undertaking."

Barrera's Sureties v. *State*, 32 Tex. 644, 651, but the criminal courts of that State are held to have sole jurisdiction in *Jeter* v. *State*, 86 Tex. 555, 557. However, in Pennsylvania, in disallowing a claim for fees by a prothonotary, the court held that an "action on the recognizance was * * * one of a criminal nature." *Commonwealth* v. *County Commissioners*, 8 S. & R. 151, 154.

"The authorities cited by respondents (Br. pp. 11–13) in this connection are inapplicable. *United States* v. *Friedman*, 8 F. Supp. 829, 831, decided by the same trial court that granted the motion to dismiss in the instant case, is inapplicable since there the suit against the surety was for the collection of a tax penalty upon which action was not instituted against the principal until after the repeal of the Eighteenth Amendment; the bond was not executed pursuant to Section 26 of the Prohibition Act; and from the circumstances, the condition thereof (which is not recited in the decision) could not have been comparable to the bond herein. Likewise, in *United States* v. *Springer & Lotz*, 69 F. (2d) 819 (C. C. A. 2d), decided by the court below, the bond was not executed pursuant to Section 26; the point at issue was the statute of limitations rather than repeal of the Eighteenth Amendment; the condition of the bond, as appears in the decision, is not comparable to the bond herein; and the decision turned upon the construction of the condition. In connection with these two cases, the language of this Court in *United States* v. *Barth*, 279 U. S. 370, 375, should be compared: "The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had."

O'Sullivan v. *Felix*, 233 U. S. 318; *Lipke* v. *Lederer*, 259 U. S. 557; and *United States* v. *Choteau*, 102 U. S. 603, are obviously inapplicable. *Yeaton* v. *United States*, 5 Cranch 281, does not involve a bond and the decision extends no further in principle than *United States* v. *Chambers*, 291 U. S. 217.

(3) *Alleged "more burdensome conditions" of bond.*—Finally, respondents contend that proceedings against the bond must be subject to the same limitations as proceedings against the vessel "for to hold otherwise, would mean that the bond subjected the owner to more onerous conditions than if he had left the vessel under arrest" (Br. pp. 6, 7). But here again the surety has joined with the principal to secure the release of the vessel, and as a condition to that release has voluntarily substituted a contract in place of summary forfeiture proceedings. The "more onerous conditions" were no more than the conditions of a contract upon valid and subsisting consideration—and, moreover, were voluntarily assumed. The parties understood the nature of contract and the condition of the bond.

But, in any event, the alleged more "onerous" or "burdensome conditions" are not shown here—for, had the principal and surety not executed the bond, the vessel could and in the ordinary course of procedure would have been subject to forfeiture and sale in a summary proceeding "merely ancillary to the criminal cause", following conviction of the defendants arrested when the boat was seized. *United States* v. *One Stephens Automobile,* 272 Fed. 188, 191 (D. Ore.).

II

But aside from the question "whether the res itself was to answer or the bond in lieu thereof" (Br. p. 6), respondents argue that "liability had

not become 'fixed' under the bond" (Br. p. 4), because "there was no order of forfeiture of this bond ever made or entered" (Br. pp. 3, 4, 5, 9, 13), and "no forfeiture can now be granted" (Br. p. 6). The point for which respondents contend is that "the forfeiture, if any, would have to be the result of judicial action independent of the judgment in the criminal cause" (Br. p. 6), and that "some judicial order or decree declaring a default and forfeiture under the bond is the prerequisite to ground a recovery upon the bond at this time" (Br. p. 6). To this line of argument there are two answers:

(1) *The nature of a "forfeiture" on the bond.*—Respondents merely contend that there must be "some judicial order or decree declaring a default", in order to "fix" the liability on the bond. In some systems of procedure, such a declaration of default is sometimes called a "forfeiture" and in some jurisdictions is a prerequisite upon which summary proceedings may be had and upon which *scire facias* may issue.[5]

In this sense, the word "forfeiture" is used as a term of the law of contract, and not as a term of criminal law. "The action to enforce, whether by a *scire facias* or by ordinary suit, does not involve the guilt or innocence, conviction or acquittal, of any party, and therefore it is not a criminal case of any grade * * *" *United States* v. *Zara-*

[5] See 19 Encyclopedia of Pleading and Practice, 312–313.

fonitis, 150 Fed. 97, 99 (C. C. A. 5th).* The argument here seems to be that such a "forfeiture" "under the bond" must have been had before the repeal of the Eighteenth Amendment. But no reason appears why such a mere declaration of default may not be made or entered after repeal, since its only function is to provide a judicial record upon which summary execution upon the bond may be had for a prior breach of condition.

Indeed, there could be no true "forfeiture" here in either the criminal or civil sense, for the right of the Government to obtain a forfeiture under Section 26 requires "not only seizure but continued possession of the vehicle seized." *The Motor Vessel K–22845,* 55 F. (2d) 666, 669 (E. D. N: Y.). Since the boat was not returned, the Government could not proceed against the boat, for "in order to institute and perfect proceedings *in rem,* it is necessary that the thing should be actually or constructively within the reach of the court." *The Brig Ann,* 9 Cranch 288, 290; and see *Miller* v. *United States,* 11 Wall. 268, 294; *Strong* v. *United States,* 46 F. (2d) 257, 260 (C. C. A. 1st).

It would seem clear that a declaration of default or "forfeiture" for a breach of condition occurring before the repeal of the Eighteenth Amendment would simply be one form of procedure to enforce the contract liability and not dependent upon the continued existence or validity of the

* See also note, 10 Am. Eng. Ann. Cas., 293–294.

criminal statute. But in any event, this is not the mode of procedure adopted by the Government herein; instead, the Government has proceeded by simple suit upon the contract.

(2) *Remedy by suit upon the contract.*—Respondents state that "*scire facias* could not issue as there is no record of any court proceedings resulting in a forfeiture upon which *scire facias* might issue" (Br. p. 5). But these are terms of summary procedure, whereas the Government has proceeded to sue upon the contract. Though summary procedure by entry of a declaration of default or "forfeiture" upon which *scire facias* can issue may be proper at least in some jurisdictions, there is undoubtedly also a remedy by suit upon the bond as in the instant case.

Scire facias "is one of the approved common-law methods of enforcing such obligations after a forfeiture is declared, and it has on some occasions been supposed that it was the only appropriate method, although it is now well settled that an original action may also be brought on bonds * * *." *United States* v. *Insley*, 54 Fed. 221, 224 (C. C. A. 8th).[1] "That the United States might have brought an action at law on [a bail]

[1] See to the same effect: *Ewing* v. *United States*, 240 Fed. 241, 250 (C. C. A. 6th); *Iowa* v. *Glass*, 9 Ia. 325, 327; *Commonwealth* v. *Green*, 12 Mass. 1; *State* v. *Cassidy*, 125 Me. 217, 218; *Potter* v. *Kingsbury*, 4 Day (Conn.) 98, 99–100; *Troy* v. *Rogers*, 116 Ala. 255, 260; *Chapline* v. *Robertson*, 44 Ark. 202, 205; *Jennings* v. *Wall*, 217 Mass. 278, 284; 19 Encyclopedia of Pleading and Practice, 293, 305.

bond cannot be doubted, for the king may maintain any action adapted to his case which a subject under like circumstances might maintain." *Ewing* v. *United States,* 240 Fed. 241, 250 (C. C. A. 6th). Indeed, action upon the bond may be had where "the libel of forfeiture filed before the car was bonded was dismissed." *United States* v. *Warnell,* 67 F. (2d) 831, 832 (C. C. A. 5th). And where the United States, in attempting to invoke summary procedure, applies "for an order directing the forfeiture of a bond" given for the release of a vessel seized under the Prohibition Act, the court may deny the motion and remit the Government "to its action upon the bond", if it is of the opinion "that a full and fair disclosure of the facts" is desirable. *The Patricia,* 1 F. Supp. 807, 808 (E. D. N. Y.). It may be noted, furthermore, that the court below in *Fidelity & Deposit Company of Baltimore* v. *United States,* 74 F. (2d) 296, now pending in this Court upon application for certiorari, No. 787) reached the same result as it did in the instant case, though the record in that case shows that the trial court on January 16, 1922, had entered an order of forfeiture.

Clearly, no entry of order of default or "forfeiture" is prerequisite to suit upon the bond herein.

III

Finally, respondents contend that "This is the purest type of statutory bond, each condition contained therein conforming with the statutory requirements of Sec. 26" (Br. p. 10, 7–8), that such a

bond "under Section 26 is dependent upon the continued validity of that statute" (Br. p. 9), and that "With the repeal of the Eighteenth Amendment, the basic right to exact a bond under Sec. 26 is lost." (Br. pp. 5–6.)

However, Section 26 of the National Prohibition Act merely authorizes officers of the United States to release property upon bond, confers a right upon claimants of property to secure a release thereof upon furnishing a proper bond (*The Lynx II*, 14 F. (2d) 697 (S. D. N. Y.)), and fixes the condition of such a bond. But a bond voluntarily given for good consideration does not depend upon the existence of statute, though occasioned and executed pursuant to the terms of some statute. The error of respondents' argument is apparent in the light of the authorities set forth in the Brief for the United States, pages 14–19.[8]

This cause arises upon motion to dismiss upon the sole ground "that the statute under which the * * * bond was given has become inoperative by virtue of the repeal of the eighteenth amend-

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[8] To the decisions cited in the Brief for the United States on the general rule prevailing in State as well as Federal courts there may be added the following decisions: *State* v. *Cochrane*, 264 Mo. 581; *State* v. *Cannon*, 34 Ia. 322.

And compare the language of this Court in *United States* v. *Barth*, 279 U. S. 370, 375: "The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had."

ment of the Constitution" and that "all penalties incurred under the National Prohibition Act was released and extinguished by the * * * repeal and adoption of the twenty-first amendment to the Constitution" (R. 5, 6). In this proceeding no questions arise as to the measure of recovery (Br. pp. 5, 10–11). The decision in *United States* v. *Bryan*, 3 F. Supp. 249 (S. D. Tex.), from which respondents quote extensively (Br. pp. 10–11), was rendered admittedly "to an extent following the practice in admiralty" (p. 250) and there were extenuating circumstances as well as a showing of "'good cause' * * * why no recovery should be had" against the principal and his sureties upon the bond (p. 251); in short, that case involved the proof of a defense, which the trial court held sufficient, rather than a motion to dismiss for fatal defect in the cause of action.

It is respectfully submitted that the judgment below should be reversed.

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